

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD GIBRICH,)
Plaintiff,) CASE NO. C09-1617-MJP
v.)
MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY DISABILITY
Defendant.) APPEAL
)
)

Plaintiff Richard Gibrich proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

20 |||

21 || || |

22 |||

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1954.¹ He completed one year of college. (AR 96.)

Plaintiff previously worked as a dishwasher/kitchen helper and forklift operator. (AR 23, 92.)

Plaintiff filed an application for SSI in June 2004. (AR 84-86.) He alleged disability

beginning May 2001 due to back pain. (AR 84, 91.) His application was denied at the initial

level and on reconsideration, and he timely requested a hearing.

On November 17, 2006, Al Verrell Dethloff held a hearing.

plaintiff. (AR 416-43.) On January 29, 2007, the ALJ issued a decision finding plaintiff not disabled. (AR 32-43.)

Plaintiff timely appealed. The Appeals Council, on October 30, 2007, remanded

plaintiff's claim to the ALJ. (AR 73-74.) The ALJ held a supplemental hearing on January

2008, taking testimony from plaintiff and vocational expert Merrill Cohen. (AR 444-55.)

The ALJ again, on June 20, 2008, issued a decision finding plaintiff not disabled. (AR 16-25.)

With some modifications, he incorporated his previous discussion of exhibits and other

evidence, analysis of exhibits, and the conclusions reached. (AR 18.)

The Appeals Council denied plaintiff's request for review on October 23, 2009 (AR

6-9), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed

this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

///

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found that plaintiff had not engaged in substantial gainful activity (SGA) since June 24, 2004, the date he protectively filed his application for SSI and the earliest date relevant to his claim. He concluded that plaintiff's part-time work at a non-profit thrift store did not rise to the level of SGA.

At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's lumbar and cervical degenerative disc disease, thoracic osteoarthritis, dysthymia, and obesity severe.

Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ concluded plaintiff did not have an impairment or combination of impairments that met or medically equaled a listing.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform light work, meaning he could stand and/or walk for six hours in an eight hour day, sit for six hours in an eight hour day, and do unlimited pushing and pulling. The ALJ found plaintiff could occasionally climb, balance, stoop, kneel, crouch, crawl, and bend, that he could perform no more than simple and complex tasks, and that he should have no more than

01 superficial contact with the public and routine supervision. With this RFC, the ALJ found
02 plaintiff unable to perform any past relevant work.

03 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
04 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
05 an adjustment to work that exists in significant levels in the national economy. With the
06 assistance of the vocational expert, the ALJ found plaintiff able to perform other jobs, such as
07 work as a small products assembler and outside deliverer.

08 This Court's review of the ALJ's decision is limited to whether the decision is in
09 accordance with the law and the findings supported by substantial evidence in the record as a
10 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
11 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
13 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
14 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
15 F.3d 947, 954 (9th Cir. 2002).

16 Plaintiff argues that the ALJ erred in ruling that his RFC assessment was supported by
17 "mild" objective findings, in consideration of the issues of following prescribed treatment and
18 obesity, in evaluating the opinions of a treating physician, and in rendering the credibility
19 decision. He requests remand for an award of benefits or, in the alternative, for further
20 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by
21 substantial evidence and should be affirmed.

22 The Court has discretion to remand for further proceedings or to award benefits. *See*

01 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of
 02 benefits where “the record has been fully developed and further administrative proceedings
 03 would serve no useful purpose.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.
 04 2002).

05 Such a circumstance arises when: (1) the ALJ has failed to provide legally
 06 sufficient reasons for rejecting the claimant’s evidence; (2) there are no
 07 outstanding issues that must be resolved before a determination of disability can
 08 be made; and (3) it is clear from the record that the ALJ would be required to
 09 find the claimant disabled if he considered the claimant’s evidence.

10 *Id.* at 1076-77. For the reasons described below, the Court concludes that this matter should be
 11 remanded for further administrative proceedings.

12 Objective Medical Evidence

13 Objective medical evidence refers to “signs” and laboratory findings. 20 C.F.R. §§
 14 404.1512(b)(1), 416.912(b)(1). “Signs are anatomical, physiological, or psychological
 15 abnormalities which can be observed, apart from your statements (symptoms). Signs must be
 16 shown by medically acceptable clinical diagnostic techniques.” §§ 404.1528(b), 416.928(b).

17 The ALJ in this case stated that the RFC assessment was “supported by the mild
 18 objective findings of record, which do not support the degree of disability” alleged. (AR 22.)
 19 Plaintiff contends the ALJ mischaracterized the record given the plethora of objective findings
 20 greater than “mild” severity. He points to June 2003 x-rays of the cervical spine and
 21 lumbosacral spine showing “moderate to marked” degenerative changes (AR 213-14), and
 22 November 2003 MRI studies showing “severe” and “moderate” disc space narrowing on the
 lumbar spine and “moderate” bilateral facet osteoarthritis on the thoracic spine (AR 205-06).

23 Plaintiff also points to his objective weight as reflecting more than mild signs.

01 Pursuant to Social Security Ruling (SSR) 02-1p, “[o]besity is a complex, chronic disease
02 characterized by excessive accumulation of body fat[”] and is classified in adults according to
03 Body Mass Index (BMI), a height/weight ratio. Plaintiff points to the record as reflecting that
04 he had a BMI well over 40, denoting “extreme obesity,” at all relevant times. (See Dkt. 12 at
05 6-7 (collecting data as to weight and BMI from record).) *See also* SSR 02-1p (“level III,
06 termed ‘extreme’ obesity and representing the greatest risk for developing obesity-related
07 impairments, includes BMIs greater than or equal to 40.”) He avers, therefore, that substantial
08 evidence does not support the ALJ’s conclusion that “mild” objective findings support the RFC
09 assessment.

10 The Commissioner observes that the ALJ acknowledged and summarized the 2003
11 x-rays and MRI studies highlighted here by plaintiff (AR 20, 36) and used those findings in
12 limiting plaintiff to light work (AR 36). Among other arguments, he asserts that, for the ALJ,
13 the moderate and marked findings were offset by findings termed mild, including, but not
14 limited to, a number of findings from the November 2003 MRI studies. (AR 36.) The
15 Commissioner also notes the ALJ’s recognition of plaintiff’s obesity and BMI, and his
16 formulation of associated exertional and postural limitations. (See, e.g., AR 20, 23.) He
17 points to the recognition in SSR 02-1p that BMI “levels describe the extent of obesity, but they
18 do not correlate with any specific degree of functional loss.” The Commissioner also points to
19 the ALJ’s consideration of treating physician Dr. Sam Eggertsen’s opinions as related to
20 obesity, including, *inter alia*, that physician’s failure to indicate any specific functional
21 limitations due to obesity and his consistent directive that plaintiff should engage in aerobic
22 exercise. (AR 21.)

01 The ALJ did describe the 2003 objective findings in his earlier decision. (AR 36.) He
 02 recited the moderate and marked findings on the June 2003 x-rays ordered by Dr. Thomas Chin,
 03 noted that Dr. Eggertsen ordered further studies, and described the November 2003 results as
 04 follows: “Lumbar spine x-rays showed degenerative disc disease at L4-5 and L5-S1 with no
 05 focal disc herniation or significant appearing central stenosis. Thoracic spine x-rays showed
 06 degenerative facet osteoarthritis at T2-T3 with no cord impingement and degenerative disc
 07 disease in the mid and lower cervical spine also without impingement.” (AR 36.) The ALJ
 08 gave weight to the November 2003 objective findings and stated that “[c]orresponding limits
 09 [were] reflected in claimant’s restriction to light duty work.” (*Id.*) The ALJ mentioned that
 10 Dr. Eggertsen later “noted that claimant had a neural surgery consultation pending but that his
 11 review of claimant’s MRI showed no surgically amenable lesion[,]” as also found by a
 12 subsequent reviewing physician. (*Id.*) He gave weight to the fact that treating and reviewing
 13 physicians “felt that surgery was not indicated for claimant.” (AR 37.)

14 Additionally, among other findings, the ALJ described a June 2003 examination by Dr.
 15 Chin finding plaintiff, *inter alia*, “was tender to palpation of the lower cervical spine and right
 16 lower paracervical areas[,]” and had “normal muscle strength” and gait. (AR 35.) He gave
 17 little weight to Dr. Chin’s opinion limiting plaintiff to sedentary work, and a similar opinion
 18 from Dr. Eggertsen in May 2004, given the lack of supporting objective evidence. (*Id.*) The
 19 ALJ also noted that, in January 2004, Dr. Eggertsen’s examination of plaintiff’s back “showed
 20 no tenderness to palpation[]” (AR 36; emphasis in original), that an August 2005 examination
 21 revealed “diffuse tenderness over the paraspinous muscles of the lower thoracic and upper
 22 lumbar back” but “no objective findings of limits[]” (AR 39), and opined that, while two later

01 forms completed by Dr. Eggertsen found plaintiff could perform sedentary work, these
 02 opinions were not supported by his treatment notes or the objective findings of record (AR
 03 38-39). The ALJ, as in the later decision, ultimately described the record as reflecting “mild
 04 objective findings[.]” (AR 41.) Additionally, in the later decision, the ALJ cited the portions
 05 of the record reflecting the 2003 objective findings in stating that plaintiff “has a history of
 06 cervical and low back degenerative changes, and obesity[,]” while adding: “There was no
 07 finding of neural compromise, however[.]” (AR 20; internal citations to record omitted.)

08 The ALJ also, as noted by the Commissioner, considered plaintiff’s obesity and BMI
 09 and assessed associated limitations. (AR 20-23.) He described Dr. Eggertsen’s treatment in
 10 relation to that condition in detail, including frequent admonitions to lose weight and exercise,
 11 the lack of specific functional limitations assessed, and the relative lack of attention paid to this
 12 condition. (AR 21 (“Overall, in his treatment notes Dr. Eggertsen mentioned obesity but did
 13 not direct much attention to it other than advising the claimant to exercise more, and lose
 14 weight.”)) The ALJ thereafter found a reviewing physician’s opinion that plaintiff could do
 15 light work with occasional climbing, balancing, stooping, kneeling, crouching, and crawling
 16 consistent with the effects of his impairments, including obesity. (AR 22.) He also, as
 17 discussed further below, considered plaintiff’s failure to follow recommendations on diet and
 18 exercise in assessing plaintiff’s credibility. (AR 23.)

19 In his reply, plaintiff argues, *inter alia*, that the absence of disc herniation requiring
 20 back surgery is a red herring. He asserts that, in fact, his back impairment is degenerative disc
 21 disease, not a herniated disc.

22 Plaintiff’s reliance on his BMI levels is unavailing. As noted by the Commissioner,

01 BMI “levels describe the extent of obesity, but they do not correlate with any specific degree of
 02 functional loss.” SSR 02-1p. In this case, the ALJ appropriately found plaintiff’s obesity
 03 severe and assessed associated limitations. (AR 19-20, 23.) Nor does plaintiff successfully
 04 discredit the ALJ’s consideration of the absence of a surgery indication. He does not, for
 05 example, point to record evidence supporting the contention that the lack of a surgical
 06 recommendation is not medically relevant in considering the severity of the condition of
 07 degenerative disc disease.

08 The remaining issue, therefore, is whether the ALJ committed reversible error in
 09 relation to the results of the 2003 x-rays and MRI studies. As averred by the Commissioner,
 10 “[t]he ALJ is responsible for resolving conflicts in the medical record.” *Carmickle v. Comm’r
 11 of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citing *Benton v. Barnhart*, 331 F.3d 1030, 1040
 12 (9th Cir. 2003)). The ALJ in this case did not ignore the results of the x-rays and MRI studies.
 13 He read the record, overall, as revealing generally mild objective findings.

14 Standing alone, it is questionable whether the ALJ’s description of the objective
 15 evidence demonstrates reversible error. However, ideally, the ALJ would have expanded on
 16 his statement as to objective findings or otherwise distinguished the 2003 x-ray and MRI study
 17 findings. (See AR 22.) Because the Court finds remand in this matter appropriate for the
 18 reasons described below, it also finds that the ALJ should be directed to clarify his statement as
 19 to objective findings. In particular, the ALJ must explain the objective findings he
 20 characterizes as mild and directly address the 2003 x-ray and MRI study findings.

21 Following Prescribed Treatment

22 Plaintiff argues that the ALJ erroneously applied the failure-to-follow-prescribed-

01 treatment regulation, 20 C.F.R. §§ 404.1530, 416.930. That regulation provides that a
 02 claimant must follow prescribed treatment if that treatment can restore the claimant's ability to
 03 work. *Id.* However, an adjudicator may consider the failure to follow prescribed treatment in
 04 an obesity case only where a plaintiff has been found disabled due to obesity, or obesity and a
 05 combination of other impairments. SSR 02-1p. Here, plaintiff argues, the ALJ improperly
 06 relied on §§ 404.1530 and 416.930 in finding that "a remediable impairment cannot provide the
 07 predicate for a finding of disability[]" (AR 23), given that he never found, before taking into
 08 account any failure to follow prescribed treatment, that plaintiff would be disabled. He asserts
 09 further error in relation to SSR 02-1p and §§ 404.1530 and 416.930, in that the treatment at
 10 issue must be prescribed treatment, not simply recommended, in that there must be clear
 11 evidence that treatment would be successful, and that a claimant may have a "good reason" for
 12 not following prescribed treatment.

13 The Commissioner concedes error in the application of the failure-to-follow-prescribed-
 14 treatment regulation, but maintains that the error was harmless given the many other reasons
 15 offered for the ALJ's conclusion. *See Carmickle*, 533 F.3d at 1162-63 (error may be deemed
 16 harmless where there remains the support of substantial evidence through other valid reasons to
 17 support the ALJ's conclusion). He notes that the ALJ's discussion of this issue appeared in the
 18 final paragraph of the RFC assessment, and was prefaced by the phrase: "In addition I note . .
 19 . ." (AR 23.)

20 This error was harmless. As argued by the Commissioner, the ALJ discussed this issue
 21 as one of many reasons supporting his RFC assessment. (*See* AR 19-23.) Nonetheless, on
 22 remand, the ALJ should, if necessary, conduct a legally sufficient analysis as to this issue.

111

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

The ALJ in this case found plaintiff's statements concerning the intensity, persistence, and limiting effects of his symptoms not credible to the extent inconsistent with the RFC assessment. (AR 20.) He first reviewed the medical record and concluded that it showed plaintiff had "some symptoms and limitations, but not to the point of disability." (AR 20-22.) The ALJ then described other evidence supporting his conclusion:

In July 2004 he took a 3-week visit by car to California, which included a

01 Disneyland visit. He also reported that he was able to care for pets and his son,
 02 do woodworking, shopping, exercising, and he managed other tasks as
 03 discussed in the prior decision and incorporated by reference. These activities
 04 are consistent with the residual functional capacity determined in this matter.

05 In July 2004, the claimant reported very limited daily activities, including
 06 difficulty with personal care and limited walking, standing, lifting, sitting, and
 07 even reclining. He claimed he was unable to travel much. This was written
 08 around the time that claimant went to Disneyland, where he must have done
 09 activities highly inconsistent with his claims in this statement, including sitting
 10 in the car for travel, walking around the park, and riding rides.

11 A vacation and a disability are not mutually exclusive, of course, although the
 12 claimant's California trip tends to suggest that the claimant's alleged limitations
 13 have been overstated. Although the claimant described daily activities that
 14 were very limited, other factors weigh against considering these allegations to
 15 be strong evidence in favor of finding the claimant disabled. First, allegedly
 16 limited daily activities cannot be objectively verified with any reasonable degree
 17 of certainty. Secondly, even if his daily activities were as limited as alleged, it
 18 is difficult to attribute the degree of limitation to the claimant's medical
 19 condition, as opposed to other reasons, in view of the medical evidence and
 20 other factors discussed in this decision. Overall, the claimant's reportedly
 21 limited daily activities are considered to be outweighed by other more
 22 persuasive evidence in the record.

23 As noted before, the claimant takes a regimen of medication that is consistent
 24 with impairments and functional limitations. But the record shows that his
 25 treatment is effective in addressing his symptoms.

26 In sum, the above residual functional capacity assessment is supported by the
 27 mild objective findings of record, which do not support the degree of disability
 28 that he claims. His medical records support a limitation to light work. As
 29 discussed before, he avoided reporting his work so he could cheat on taxes, and
 30 his earnings report is not indicative of his work history. The claimant's
 31 inconsistent statements throughout the record, and compliance problems,
 32 negatively affect his credibility.

33 In particular, he has failed to diet, although some success is apparent when he
 34 does, and he failed to exercise. Failure to follow recommended dietary
 35 guidelines militates against a finding of disability. See, Dixon v. Massanari, 270
 36 F.3d 1171, 1179 ([8th] Cir. 2001), Dumas v. Schweicker, 712 F.2d 1545, 1553
 37 ([2d] Cir. 1983). Failure to lose weight as recommended may be taken into
 38 account in assessing whether pain is disabling. Nelson v. Sullivan, 966 F.2d

01 363, 367 ([8th] Cir. 1992). See, Osenbrock v. Apfel, 240 F.3d 1157, 1161
 02 ([9th] Cir. 2000); Fair v. Bowen, 885 F.2d 597, 604 ([9th] Cir. 1989). Treating
 03 source's advice to increase activity militates against credibility of complaints of
 04 disability. See, Curry v. Sullivan, 925 F.2d 1127, 1130 ([9th] Cir. 1990). Failure
 to follow through on recommendations to exercise as a means to ameliorate condition detracts from the credibility of complaints of pain. Fair v.
Bowen, *supra*, at 603; Roth v. Shalala, 45 F.3d 279, 283 ([8th] Cir. 1995).

05 I find the BMI issue limits the claimant to occasional postural restrictions,
 06 including bending; this was largely considered by the DDS in its assessment.

07 (AR 22-23; internal citations to record omitted.) The ALJ thereafter, as described above,
 08 improperly applied the failure-to-follow-prescribed-treatment regulation. (AR 23.) (See also
 09 AR 39-41 (2007 credibility assessment).)

10 Plaintiff first argues that the ALJ erroneously found him not credible because he did not
 11 lose weight, follow a diet, or exercise enough. He cites the Ninth Circuit's decision in *Orn v.*
 12 *Astrue*, 495 F.3d 625, 638 (9th Cir. 2007), wherein the Court stated that "the failure to follow
 13 treatment for obesity tells us little or nothing about a claimant's credibility." Plaintiff
 14 maintains that this erroneous reasoning of the ALJ was at the core of the credibility analysis.

15 Plaintiff also contends that, in addition to the failure to properly evaluate the objective
 16 evidence and his obesity, the ALJ unreasonably found his limited activities, such as driving a
 17 car and taking a vacation, to show that he could perform full time work in the light exertional
 18 range. He maintains that his overall activities were in the sedentary range. *See Vertigan*, 260
 19 F.3d at 1049 ("[T]he mere fact that a plaintiff has carried on certain daily activities, such as
 20 grocery shopping, driving a car, or limited walking for exercise, does not in any way detract
 21 from her credibility as to her overall disability.") He asserts that, as of age fifty in October
 22 2004, he would be considered disabled if limited to unskilled sedentary work pursuant to the

01 Medical-Vocational Guidelines. 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14
 02 (designating disability for individuals limited to sedentary work who are closely approaching
 03 advanced age, with a high school degree or more, does not provide for direct entry to skilled
 04 work, and whose previous work is unskilled or whose skills are not transferable). Plaintiff also
 05 avers that his vacation in 2004 does not suffice as even a scintilla of evidence that he could
 06 perform, full time, a wide range of light activities from 2004 through the date of the ALJ's
 07 decision in 2008.

08 The Commissioner maintains that the ALJ adequately supported his credibility
 09 assessment. He points to the ALJ's reliance on the inconsistency between plaintiff's trip to
 10 California and statements he made as to his limitations at around the same time as that trip, as
 11 well as inconsistencies between his alleged symptoms and activities in general. (AR 22.) The
 12 Commissioner includes reasoning contained in the ALJ's initial decision, including, for
 13 example, the inconsistency between the fact that plaintiff allegedly did not drive and the
 14 references in the record to "significant driving[,]" such as the fact that he had his tires rotated
 15 every three months and his past arrest for driving on a suspended license. (AR 40-41.) He
 16 asserts that the ALJ may "draw inferences logically flowing from the evidence." *Sample v.*
 17 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (cited sources omitted). Finally, the
 18 Commissioner points to the ALJ's reliance on evidence shedding doubt on plaintiff's reputation
 19 for truthfulness, such as his failure to report his work to avoid paying taxes (AR 22, 40-41), and,
 20 as the ALJ noted in the initial decision, the discrepancy between his testimony that he smoked
 21 three to four cigarettes a week and his failure to report this fact to his treating physician (AR
 22 39). The Commissioner maintains that the multiple bases for finding plaintiff not credible,

01 including the evidence from health care providers undermining plaintiff's allegations, deflate
 02 the contention that the core basis for the adverse credibility finding was plaintiff's inability to
 03 lose weight, diet, or exercise sufficiently.

04 In rendering his decision, the ALJ cited a number of cases supporting his reliance on
 05 plaintiff's failure to follow recommendations to diet, lose weight, and increase activity/
 06 exercise. (AR 23.) However, neither the ALJ, nor the Commissioner, addressed *Orn*, the
 07 more recent Ninth Circuit decision on this subject. In that case, the Ninth Circuit distinguished
 08 the applicability of its prior rulings on the issue of following prescribed treatment in cases
 09 involving obesity:

10 Our case law is clear that if a claimant complains about disabling pain but fails
 11 to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ
 12 may use such failure as a basis for finding the complaint unjustified or
 13 exaggerated. *See, e.g.*, [*Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)]. In the
 14 case of a complaint of pain, such failure may be probative of credibility, because
 15 a person's normal reaction is to seek relief from pain, and because modern
 16 medicine is often successful in providing some relief. But in the case of
 17 impairments where the stimulus to seek relief is less pronounced, and where
 18 medical treatment is very unlikely to be successful, the approach to credibility
 makes little sense. This second case is probably best exemplified by a claimant
 whose obesity adversely affects his or her health and activities. *See* S.S.R. 02-1p
 at 9 (defining "prescribed treatment" narrowly and stating that failure to follow
 treatment for obesity will "rarely" affect disability determinations). **Thus, the
 failure to follow treatment for obesity tells us little or nothing about a
 claimant's credibility.** In the case before us, there is no reason to conclude from
 Orn's failure to adhere to an 1800 calorie-per-day diet that he is not telling the
 truth about his medical problems that are exacerbated by his obesity.

19 *Orn*, 495 F.3d at 638 (emphasis added). *See also Hostrawser v. Astrue*, No. 08-17474, 2010
 20 U.S. App. LEXIS 2594 at *9 (9th Cir. Feb. 5, 2010) (applying *Orn* and finding ALJ erred in
 21 finding claimant "not credible due to his failure to lose weight despite his doctors'
 22 recommendations.")

01 As argued by plaintiff, the ALJ in this case focused significantly on plaintiff's failures
 02 in regard to dieting, losing weight, and exercising. Indeed, he prefaced his discussion of the
 03 issue with the phrase “[i]n particular[.]” (AR 22-23.) Given *Orn*, this emphasis is
 04 problematic. The ALJ also, as stated above, improperly applied the failure-to-follow-
 05 prescribed-treatment regulation.

06 Nonetheless, the Court is not convinced that plaintiff demonstrates reversible error in
 07 the ALJ's credibility assessment. A single trip, standing alone, is not compelling evidence to
 08 counter a claimant's assertions as to his limitations. *See, e.g., Tackett v. Apfel*, 180 F.3d 1094,
 09 1103 (9th Cir. 1999) (road trip to California not sufficient to counter physicians' opinions that
 10 claimant needed to shift positions every thirty minutes or so, where there was an absence of
 11 information as to his positioning in the car and the frequency and duration of rest stops).
 12 However, the ALJ discussed not only the fact of and activities during plaintiff's trip to
 13 California, but the fact that the trip took place coextensive with plaintiff's recounting of “very
 14 limited daily activities, including difficulty with personal care and limited walking, standing,
 15 lifting, sitting, and even reclining.” (AR 22.) The ALJ also, as observed by the
 16 Commissioner, gave a number of other reasons for doubting the credibility of plaintiff's
 17 assertions, including conflicts with the medical record and plaintiff's activities, and instances
 18 shedding doubt on his truthfulness. Additionally, although not discussed in the credibility
 19 assessment, the ALJ had also, at step one, found that while a part-time job was not substantial
 20 gainful activity, “it suggests that he is able to get out in public and interact in a work
 21 environment.” (AR 18.)

22 Because the ALJ offered clear and convincing reasons for his credibility assessment,

01 errors as they relate to plaintiff's failure to follow prescribed treatment may be deemed
 02 harmless. *See Carmickle*, 533 F.3d at 1162-63 (error may be deemed harmless where there
 03 remains the support of substantial evidence through other valid reasons to support the ALJ's
 04 conclusion). However, on remand, the ALJ should reassess plaintiff's credibility both with
 05 respect to the issue of his obesity and the failure to diet, lose weight, and exercise, and as
 06 necessitated by reassessment of the medical opinions, as discussed below.

07 Medical Opinions

08 In general, more weight should be given to the opinion of a treating physician than to a
 09 non-treating physician, and more weight to the opinion of an examining physician than to a
 10 non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another
 11 physician, a treating or examining physician's opinion may be rejected only for "clear and
 12 convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
 13 Where contradicted, a treating or examining physician's opinion may not be rejected without
 14 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
 15 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

16 "The opinion of a nonexamining physician cannot by itself constitute substantial
 17 evidence that justifies the rejection of the opinion of either an examining physician or a treating
 18 physician." *Id.* at 831 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) and
 19 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984)). However, "the report of a
 20 nonexamining, nontreating physician need not be discounted when it 'is not contradicted by *all*
 21 *other evidence* in the record.'" *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (quoting
 22 *Magallanes*, 881 F.2d at 752 (emphasis in original)).

01 The ALJ may reject physicians' opinions "by setting out a detailed and thorough
 02 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
 03 making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,
 04 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ "must set forth his own
 05 interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing
 06 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

07 Plaintiff argues that the ALJ erroneously rejected the opinions of treating physician Dr.
 08 Eggertsen limiting him to sedentary work. (AR 221, 288, 312-15, 386, 388.) Again, he
 09 asserts that, as of the date he turned fifty in October 2004, this restriction to sedentary work
 10 leads to a conclusion of disability. 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14.

11 The ALJ addressed the opinions of Dr. Eggertsen as follows:

12 With respect to the issue of obesity, at the prior hearing, claimant said that he
 13 was 5'11 and 350 pounds. His treating doctor, Sam Eggertsen, M.D., has told
 14 him to lose weight. It does not appear that claimant followed up on these
 15 constant recommendations, but Dr. Eggertsen never mentioned specific
 16 functional observations relevant to the claimant's obesity, and has never really
 17 discussed it, even when describing particular examination findings. In April
 18 2005, the claimant said he was trying to work on exercise and weight loss. His
 19 weight was down to 326 from 334. Even though he claimed to be exercising,
 20 by August 22, 2005, his weight was back up to 334. Dr. Eggertsen strongly
 21 recommended diet and aerobic activity.

22 By January 2006, the claimant's weight was down to 322. His back pain was
 23 doing well with Vicodin. It has gone up since then, however.

24 In November 2006, Dr. Eggertsen assessed the claimant with a capacity for
 25 sedentary work with periodic alternating between sitting and standing.
 26 Claimant could do limited pushing and pulling and had postural and
 27 manipulative limitations. This discussion was based on consideration of the
 28 claimant's obesity and his other impairments. This was a check-box form
 29 without narrative support, and it is inconsistent with Dr. Eggertsen's treatment
 30 notes and the objective findings of record. Dr. Eggertsen's opinion was based

01 on the claimant's subjective complaints, apparently, and is not given great
 02 weight. Overall, in his treatment notes Dr. Eggertsen mentioned obesity but
 03 did not direct much attention to it other than advising the claimant to exercise
 04 more, and lose weight.

05 Later reports are also considered: the claimant continued to see Dr. Eggertsen
 06 for routine follow-up and medication management. The claimant was not
 07 compliant with diet and gained weight, staying over 300 pounds. He
 08 complained of radiating back pain, without radiation, and exacerbated by
 bending and lifting; he also reported that his pain was improved by exercise.
 That inconsistency was unexplained. In April 2007 Dr. Eggertsen stated that
 the claimant had bilaterally positive straight leg raise at 45 degrees. That
 would suggest a degree of back pain, but these findings are not described
 elsewhere in the record, and Dr. Eggertsen generally found the claimant in no
 distress.

09 In January and February 2008 Dr. Eggertsen again assessed the claimant as
 10 capable of sedentary work without restrictions. As before, these were
 11 check-box reports without narrative support. They are not consistent with his
 12 office notes showing that the claimant had mild pain and should perform aerobic
 13 exercise as part of his treatment regimen. All in all, these reports are very
 14 subjective. Just as with the earlier assessment, the claimant's symptoms were
 15 subjective without evidence to support them. These reports are given scant
 16 weight with respect to the limitations indicated.

17 (AR 21; internal citations to record omitted.) The ALJ then assessed the opinions of a
 18 non-examining physician, Dr. Jeffrey Merrill, on a Physical RFC Assessment form (PRFCA):

19 A DDS reviewing source concluded that claimant could do light exertional work
 20 with occasional climbing, balancing, stooping, kneeling, crouching, and
 21 crawling. That assessment is consistent with the effects of the claimant's
 22 impairments, including obesity. Although the state agency doctor did not
 examine the claimant, his opinion is more consistent with claimant's activities
 and objective findings. This assessment is given very great weight.

23 (AR 22; internal citation to AR 178-83 omitted.)²

24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000
 1001
 1002
 1003
 1004
 1005
 1006
 1007
 1008
 1009
 10010
 10011
 10012
 10013
 10014
 10015
 10016
 10017
 10018
 10019
 10020
 10021
 10022
 10023
 10024
 10025
 10026
 10027
 10028
 10029
 10030
 10031
 10032
 10033
 10034
 10035
 10036
 10037
 10038
 10039
 10040
 10041
 10042
 10043
 10044
 10045
 10046
 10047
 10048
 10049
 10050
 10051
 10052
 10053
 10054
 10055
 10056
 10057
 10058
 10059
 10060
 10061
 10062
 10063
 10064
 10065
 10066
 10067
 10068
 10069
 10070
 10071
 10072
 10073
 10074
 10075
 10076
 10077
 10078
 10079
 10080
 10081
 10082
 10083
 10084
 10085
 10086
 10087
 10088
 10089
 10090
 10091
 10092
 10093
 10094
 10095
 10096
 10097
 10098
 10099
 100100
 100101
 100102
 100103
 100104
 100105
 100106
 100107
 100108
 100109
 100110
 100111
 100112
 100113
 100114
 100115
 100116
 100117
 100118
 100119
 100120
 100121
 100122
 100123
 100124
 100125
 100126
 100127
 100128
 100129
 100130
 100131
 100132
 100133
 100134
 100135
 100136
 100137
 100138
 100139
 100140
 100141
 100142
 100143
 100144
 100145
 100146
 100147
 100148
 100149
 100150
 100151
 100152
 100153
 100154
 100155
 100156
 100157
 100158
 100159
 100160
 100161
 100162
 100163
 100164
 100165
 100166
 100167
 100168
 100169
 100170
 100171
 100172
 100173
 100174
 100175
 100176
 100177
 100178
 100179
 100180
 100181
 100182
 100183
 100184
 100185
 100186
 100187
 100188
 100189
 100190
 100191
 100192
 100193
 100194
 100195
 100196
 100197
 100198
 100199
 100200
 100201
 100202
 100203
 100204
 100205
 100206
 100207
 100208
 100209
 100210
 100211
 100212
 100213
 100214
 100215
 100216
 100217
 100218
 100219
 100220
 100221
 100222
 100223
 100224
 100225
 100226
 100227
 100228
 100229
 100230
 100231
 100232
 100233
 100234
 100235
 100236
 100237
 100238
 100239
 100240
 100241
 100242
 100243
 100244
 100245
 100246
 100247
 100248
 100249
 100250
 100251
 100252
 100253
 100254
 100255
 100256
 100257
 100258
 100259
 100260
 100261
 100262
 100263
 100264
 100265
 100266
 100267
 100268
 100269
 100270
 100271
 100272
 100273
 100274
 100275
 100276
 100277
 100278
 100279
 100280
 100281
 100282
 100283
 100284
 100285
 100286
 100287
 100288
 100289
 100290
 100291
 100292
 100293
 100294
 100295
 100296
 100297
 100298
 100299
 100300
 100301
 100302
 100303
 100304
 100305
 100306
 100307
 100308
 100309
 100310
 100311
 100312
 100313
 100314
 100315
 100316
 100317
 100318
 100319
 100320
 100321
 100322
 100323
 100324
 100325
 100326
 100327
 100328
 100329
 100330
 100331
 100332
 100333
 100334
 100335
 100336
 100337
 100338
 100339
 100340
 100341
 100342
 100343
 100344
 100345
 100346
 100347
 100348
 100349
 100350
 100351
 100352
 100353
 100354
 100355
 100356
 100357
 100358
 100359
 100360
 100361
 100362
 100363
 100364
 100365
 100366
 100367
 100368
 100369
 100370
 100371
 100372
 100373
 100374
 100375
 100376
 100377
 100378
 100379
 100380
 100381
 100382
 100383
 100384

01 Plaintiff avers that the ALJ's failure to expressly cite either regulatory or Ninth Circuit
 02 law as to the framework for assessing a treating physician's opinions is non-conclusive
 03 evidence that the ALJ did not use that framework. *See* 20 C.F.R. § 416.927 (Evaluating
 04 opinion evidence). He takes issue with the ALJ's reliance on the allegedly "mild" findings and
 05 the recommendations to diet, lose weight, and exercise, for the reasons discussed above.
 06 Plaintiff also challenges the apparent rejection of Dr. Eggertsen's opinions on the ground that
 07 that physician did not address functional limitations in his clinical notes. He asserts that a busy
 08 physician offers such opinions not in clinical notes as a routine matter, but when asked for such
 09 opinions, as Dr. Eggertsen did here.

10 Plaintiff notes that Dr. Eggertsen's opinions were not controverted by the opinion of a
 11 treating or examining physician. Instead, the ALJ gave "very great weight" to opinions
 12 contained on the PRFCA signed by a non-examining physician, Dr. Merrill. Plaintiff stresses
 13 that the form was prepared by a non-physician adjudicator and only later affirmed by Dr.
 14 Merrill, a fact not acknowledged by the ALJ. He asserts error in the assignment of greater
 15 weight to the check-box PRFCA, containing explanatory comments only from the
 16 non-physician adjudicator. *See* SSR 96-8p ("[T]he opinions of physicians or psychologists
 17 who do not have a treatment relationship with the individual are weighed by stricter standards,
 18 based to a greater degree on medical evidence, qualifications, and explanations for the opinions,
 19 than are required of treating sources.") Plaintiff argues that the Court should hold him clearly
 20 disabled at step five, either since his SSI application month of June 2004 based on his inability

21
 22 function[] best in a job with limited public contact and routine supervision." (AR 22; internal citation
 omitted.)

01 to work full time, *see* SSR 96-8p, or since his fiftieth birthday in October 2004 due to Dr.
 02 Eggertsen's opinions finding him limited to sedentary work, *see* 20 C.F.R. Pt. 404, App. 2, Tbl.
 03 1, Rules 201.12, 201.14.

04 The fact that the ALJ did not recite the legal framework for the relative weight to afford
 05 physicians' opinions is not, in and of itself, troubling. However, consideration of that
 06 framework in relation to the ALJ's decision in this case reveals reversible error.

07 SSR 96-6p addresses the proper treatment of opinions of reviewing State agency
 08 consultants and other program physicians and psychologists. It does not discuss
 09 non-physician adjudicators. Nor does it reflect that a State agency physician affirming the
 10 assessment of a non-physician adjudicator must provide independent analysis. Instead, SSR
 11 96-6p indicates that a State agency physician's explanation for his or her opinion is one of
 12 several different factors to consider in determining the weight to accord that opinion. As such,
 13 as argued by the Commissioner, the ALJ did not err in giving weight to the opinions of Dr.
 14 Merrill, who, in signing the form, indicated he had reviewed the evidence in the file and
 15 affirmed the opinions in the PRFCA as written. (AR 183.)

16 However, as argued by plaintiff, it is questionable whether substantial evidence
 17 supports the ALJ's decision to give greater weight to the opinions of Dr. Merrill over those of
 18 Dr. Eggertsen. An ALJ permissibly rejects opinions rendered on check-off reports lacking any
 19 explanation for the conclusions reached. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1995).
 20 Here, the ALJ criticized the opinions of Dr. Eggertsen, in part, based on their inclusion in
 21 check-box forms, without narrative support. (AR 21.) Yet, he rendered no such criticism of
 22 the check-box form signed by Dr. Merrill. (AR 22.) While the PRFCA did contain one

01 explanatory paragraph (AR 180), the information contained within that paragraph did not
 02 significantly, if at all, exceed that contained on Dr. Eggertsen's various forms (*see* AR 220,
 03 287, 313-14, 388). Nor did the ALJ provide any explanation as to how Dr. Eggertsen's
 04 opinions were inconsistent with his treatment notes and the objective findings, or how Dr.
 05 Merrill's were consistent with plaintiff's activities and the objective findings. (AR 21-22.)
 06 Also, as discussed above, plaintiff legitimately criticizes the ALJ's focus on plaintiff's failures
 07 in relation to his obesity and, to some extent, the ALJ's reflections as they relate to the objective
 08 findings in the record.

09 Plaintiff's argument as it relates to Dr. Eggertsen's failure to mention specific
 10 functional observations relevant to plaintiff's obesity is not entirely persuasive. While
 11 criticizing the failure to mention such observations, the ALJ later stated that Dr. Eggertsen
 12 based his November 2006 opinions, which included specific assessed limitations, "on
 13 consideration of plaintiff's obesity and his other impairments." (AR 21.) Interestingly, the
 14 November 2006 form included references to back and shoulder pain, but did not actually
 15 mention plaintiff's obesity. (AR 312-15.) At the same time, as argued by plaintiff, a treating
 16 physician would be more likely to address specific functional limitations in forms seeking such
 17 information, rather than in treatment records. However, the lack of any mention in the
 18 treatment records could be significant as evidence that plaintiff never mentioned any limitations
 19 due to his weight as part of his complaints or as part of his medical history.

20 The Court also notes that, although not discussed in the ALJ's second decision or
 21 brought up by the parties in their arguments, the record contained an additional opinion from an
 22 examining or treating physician, Dr. Chin, limiting plaintiff to sedentary work. (AR 202-03.)

01 While the ALJ's decision to afford Dr. Chin's opinion little weight may well withstand
 02 scrutiny, the existence of a second opinion from an examining or treating physician further
 03 detracts from the ALJ's decision to rely on the single opinion of a non-examining physician.
 04 *See, e.g., Lester*, 81 F.3d at 831 ("The opinion of a nonexamining physician cannot by itself
 05 constitute substantial evidence that justifies the rejection of the opinion of either an examining
 06 physician or a treating physician.") (cited sources omitted).

07 Given the above-described deficiencies in the ALJ's rejection of Dr. Eggertsen's
 08 opinions, those opinions could be credited as true. *See Lester*, 81 F.3d at 830-34 ("Where the
 09 Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or
 10 examining physician, [the Court credits] that opinion as 'a matter of law.'"; finding that, if
 11 doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a
 12 listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion
 13 as a matter of law is appropriate when, taking that opinion as true, the evidence supports a
 14 finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d
 15 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect
 16 required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional
 17 limitations is sufficient to meet or equal [a listing.]"); *Smolen v. Chater*, 80 F.3d 1273, 1292
 18 (9th Cir. 1996) (ALJ's reasoning for rejecting subjective symptom testimony, physicians'
 19 opinions, and lay testimony legally insufficient; finding record fully developed and disability
 20 finding clearly required). In this case, for the reasons described below, plaintiff fails to
 21 demonstrate that Dr. Eggertsen's opinions should be credited as true.

22 The Commissioner observes several legitimate reasons for the ALJ's assessment of Dr.

01 Eggertsen's opinions. The reports completed by Dr. Eggertsen were in check-box format,
 02 arguably unsupported by the treatment notes, and arguably, at least in part, reliant on plaintiff's
 03 subjective complaints,³ which the ALJ found not credible. *See, e.g., Batson v. Commissioner,*
 04 359 F.3d 1190, 1195 (9th Cir. 2004) (a treating physician's opinions may be discounted when it
 05 is "in the form of a checklist, did not have supportive objective evidence, was contradicted by
 06 other statements and assessments of [the claimant's condition], and was based on [the
 07 claimant's] subjective descriptions of pain[,]" as well as when that opinion is "conclusory,
 08 brief, and unsupported by the record as a whole . . . or by objective medical findings[.]") and
 09 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) ("An ALJ may reject a treating
 10 physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been
 11 properly discounted as incredible.") (quoted and cited sources omitted). The ALJ also noted
 12 the reflection in Dr. Eggertsen's notes that plaintiff's pain was improved with medication and
 13 exercise. (AR 21.) (See, e.g., AR 308 (May 2005 treatment note from Dr. Eggertsen stating:
 14 "50-year-old with chronic back pain, stable on current medication along with exercise and
 15 hypertriglyceridemia, on Niacin and Gemfibrozil."); AR 340 (April 2007 treatment note from
 16 Dr. Eggertsen stating: "A 52-year-old with mild thoracic outlet syndrome symptoms, chronic
 17 pain, hypertension, under good control, hyperlipidemia, under good control, and mild
 18 diabetes.")) Given the legitimate aspects of the ALJ's reasoning, and based on review of the
 19 record as a whole, the Court concludes that crediting Dr. Eggertsen's opinions as true and
 20 awarding benefits would not be appropriate in this case. *See, e.g., Connett v. Barnhart*, 340
 21 F.3d 871, 876 (9th Cir. 2003) (reflecting that courts retain flexibility in applying the "crediting

22 3 Dr. Eggertson did, in his November 2006 report, recite the MRI findings. (AR 313.)

01 as true' theory."); remanding for further determinations where there were insufficient findings
 02 as to whether plaintiff's testimony should be credited as true); *Barbato v. Commissioner of Soc.*
 03 *Sec. Admin.*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) ("In some cases, automatic reversal
 04 would bestow a benefits windfall upon an undeserving, able claimant."); remanding for further
 05 proceedings where the ALJ made a good faith error, in that some of his stated reasons for
 06 rejecting a physician's opinion were legally insufficient).

07 Instead, the Court concludes that the ALJ in this case should have contacted Dr.
 08 Eggertsen for further information. An ALJ has an obligation to recontact a treating physician
 09 or psychologist when the evidence received is inadequate for a determination of disability. 20
 10 C.F.R. §§ 404.1512(e), 416.912(e). *See also Widmark v. Barnhart*, 454 F.3d 1063, 1068 (9th
 11 Cir. 2006) ("[T]he ALJ should not be 'a mere umpire' during disability proceedings. Rather, the
 12 ALJ has 'a special duty to fully and fairly develop the record and to assure that the claimant's
 13 interests are considered.'") (quoted sources omitted). The "ALJ's duty to develop the record
 14 further is triggered only when there is ambiguous evidence or when the record is inadequate to
 15 allow for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th
 16 Cir. 2001). *See also Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) ("Ambiguous
 17 evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation
 18 of the evidence, triggers the ALJ's duty to 'conduct an appropriate inquiry.'") (quoted source
 19 omitted). The applicable regulations note that additional evidence or clarification is sought
 20 when a medical source's report "contains a conflict or ambiguity that must be resolved, . . . does
 21 not contain all the necessary information, or does not appear to be based on medically
 22 acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §§ 404.1512(e)(1),

01 416.912(e)(1).

02 The Commissioner would presumably argue that there was no duty to recontact where
03 Dr. Eggertsen's opinions were not supported by the clinical evidence and based on the
04 claimant's subjective complaints, and where the ALJ found the record adequate to make a
05 determination as to disability. *See, e.g., Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir.
06 1995). However, the Court finds that the disparity between the findings in the treatment notes
07 and the conclusions reached on the check-box forms presents an unresolved ambiguity.
08 Additionally, the Commissioner repeatedly points to a perceived inconsistency by the ALJ in
09 that Dr. Eggertsen simultaneously assessed plaintiff as limited to sedentary work while
10 recommending that he undertake aerobic activity. (AR 21, 222, 289, 387, 389.) This is not
11 necessarily an inconsistency. That is, it would seem reasonable for a physician to find an
12 individual in his present state restricted to sedentary work due to obesity and back pain, but
13 nonetheless recommend aerobic activity as a means of treating the restricting conditions.
14 Nonetheless, the ALJ was clearly troubled by this perceived inconsistency. Also, the record in
15 this case as a whole contains notably minimal opinion evidence.

16 The Court also takes note of the fact that Dr. Eggertsen, in November 2006, found
17 plaintiff capable of a slightly greater capacity of work than on other occasions in finding
18 plaintiff capable of lifting up to ten pounds both occasionally and frequently, and of standing
19 and/or walking at least two hours in an eight-hour workday. (AR 312.) Dr. Eggertsen had on
20 other occasions found plaintiff limited to occasional lifting of up to ten pounds and frequent
21 lifting of either up to five pounds or "such articles as files and small tools[,]” and to work which
22 "may require sitting, walking and standing for brief periods." (AR 221, 288, 312, 386, 388.)

01 This disparity raises a possible question as to whether, based on Dr. Eggertsen's opinions as to
02 sedentary work, plaintiff could be deemed disabled as of his fiftieth birthday pursuant to the
03 Medical-Vocational Guidelines. *See* 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14
04 (designating disability for individuals limited to sedentary work) and 20 C.F.R. §§ 404.1567(a),
05 416.967(a) ("Sedentary work involves lifting no more than 10 pounds at a time and
06 occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a
07 sedentary job is defined as one which involves sitting, a certain amount of walking and standing
08 is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are
09 required occasionally and other sedentary criteria are met.") *See also infra* at 27-28
10 (discussing an additional issue precluding a finding of disability based on the
11 Medical-Vocational Guidelines).

12 In sum, the Court recommends that this matter be remanded for further administrative
13 proceedings. The ALJ should contact Dr. Eggertsen for further explanation of the bases for his
14 opinions finding plaintiff limited to sedentary work and to explain the discrepancy between his
15 findings in November 2006 and on other occasions. The ALJ should also call a medical expert
16 to obtain an additional medical opinion.

17 Remand

18 As stated above, this case should be remanded for further administrative proceedings.
19 The Court separately addresses below other arguments offered in favor of remand for an award
20 of benefits.

21 Plaintiff argues that, based on the opinions finding him limited to sedentary work, he
22 could be deemed disabled as of his fiftieth birthday in October 2004 pursuant to the

01 Medical-Vocational Guidelines. 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14.
 02 However, in order to be deemed disabled as a matter of law under those rules, a claimant would
 03 have to have unskilled past relevant work experience or no transferable skills. *Id.* Plaintiff's
 04 past relevant work included unskilled work as a kitchen helper and semi-skilled work as a
 05 forklift operator. (*See* AR 450 and SSR 00-4p.) Plaintiff concedes that the ALJ did not
 06 determine the issue of transferable skills. He maintains that he could not reasonably be found
 07 to have transferable skills to sedentary work from such low-semi-skilled work. He
 08 alternatively argues that, if the Court does not agree he did not have transferable skills, it should
 09 remand for a determination as to whether he has transferable skills from his work as a forklift
 10 operator to semi-skilled sedentary work.

11 Because the ALJ did not address the issue, it would not be appropriate for the Court to
 12 render a decision as to transferable skills. At the very least, therefore, this matter requires
 13 remand as to this issue.

14 Plaintiff also argues generally that he could be deemed clearly disabled at step five
 15 based on his inability to work full time. *See* SSR 96-8p (defining RFC as ability to work on a
 16 “regular and continuing basis[,]” meaning “8 hours a day, for 5 days a week, or an equivalent
 17 work schedule.”) However, he does not point to any medical opinions, from Dr. Eggertsen or
 18 otherwise, supporting an assertion as to his inability to work full time. Dr. Eggersten
 19 repeatedly assessed plaintiff as able to work at the sedentary level and “able to participate in
 20 pre-employment activities such as job search or employment classes[.]” (AR 221-22, 288-89,
 21 386.) Dr. Eggertsen did, in a March 2008 documentation request form, opine that plaintiff was
 22 limited to working “11-20” hours per week due to his back pain. (AR 388.) However, he had

01 not so opined on a like form completed two months prior (AR 386), or indicated any similar
02 opinion in the preceding years. Moreover, to the extent plaintiff relies on his own assertion of
03 an inability to work full time, the ALJ offered sufficient reasons for doubting plaintiff's
04 credibility. As such, plaintiff fails to adequately support his assertion that he could be deemed
05 clearly disabled based on an inability to work full time.

06 **CONCLUSION**

07 For the reasons set forth above, this matter should be REMANDED for further
08 administrative proceedings. A proposed order accompanies this Report and Recommendation.

09 DATED this 16th day of June, 2010.

10 
11 Mary Alice Theiler
12 United States Magistrate Judge

13
14
15
16
17
18
19
20
21
22